Che Mohd Sufian @ Che Bastian bin Che Rashid v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42H-192–12 OF 2011
AMELIA TEE ABDULLAH J
30 APRIL 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for rape under s 376(2) of the Penal Code — Sentenced to 20 years imprisonment and seven strokes of rotan — Whether sentence manifestly excessive — Whether there were injuries suffered by victim — Whether element of force proven — Whether penetration proven — Whether evidence corroborated

The appellant was charged with an offence of rape punishable under s 376(2)(a) of the Penal Code. Briefly, the appellant had knocked down the victim ('PW1') and offered to take her to the hospital. Instead of taking her to the hospital, the appellant took PW1 to his house where he tied and raped her. In the sessions court, the appellant was convicted of the charge and was sentenced to 20 years' imprisonment and seven strokes of the *rotan*. Dissatisfied with the decision of the sessions court judge ('the SCJ'), the appellant appealed against his conviction and sentence and argued that there was no evidence to show injuries suffered by PW1; there was no element of force used in this case; there was an absence of corroboration; SP1 did not see whether there was penetration; there was an absence of penetration; and the SCJ failed to consider the mitigation of the appellant.

Held, dismissing the appeal:

(1) The complainant did indeed suffer injuries both before and during the rape. She suffered injuries when the appellant knocked her down with his car. Although those injuries were not serious as compared to the injuries sustained during the rape and in the course of the rape, they were sustained as a result of the accident and were sufficient to temporarily incapacitate her to such extent that the appellant was able to take advantage of her weakened condition. She also suffered injuries when she was roughed up by the appellant in order to subdue her resistance. She suffered injury to her neck when her face and neck were pressed into the mattress such that found difficulty to breathe (see para 16).

(2) There was force used on the complainant in this case. This is amply borne out by the evidence of the complainant and corroborated by the evidence of a nurse, Dr Patrick ('PW6') and Dr Rozita ('PW8') to whom the

complainant had reported the rape. The court was unable to agree with the appellant that that the facts show that the appellant and the complainant had a consensual sexual encounter. Being hit by a car before being taken to the appellant's house, being roughed up and tied up before the sexual act is not consistent with and could not conceivably be viewed as consensual sex (see paras 24 & 28).

(3) In light of the fact PW8 had only carried out a brief and external examination of the complainant before referring her to the hospital where a full and complete examination was carried out by PW6, there were no contradictions between evidence of the two medical doctors pertaining to the bleeding from the complainant's vagina. Their evidence would necessarily be different because there was no suggestion that Dr Rozita had ever examined the complainant's vagina (see paras 34–35).

(4) The evidence of the complainant would show that there was penetration. Even though she did not see the appellant's penis actually entering her vagina, she felt it and she felt the pain. There was no reason to disbelieve her evidence especially when the DNA analysis would show that there was ejaculation and hence seminal stains from the appellant were found on the towel, brassiere, tube underwear, as well as underwear. The complainant had testified as to the pain that she felt when the appellant had raped her and this was corroborated by the presence of her blood stains on the towel, *baju kurung* and tube underwear. The presence of both the complainant's as well as the appellant's DNA on the used adhesive tape would corroborate the complainant's story that she was tied up. The absence of the appellant's DNA profile from the high vaginal swab, low vaginal swab, and vaginal pool would corroborate the complainant's evidence that the appellant had ejaculated on her stomach. There was no necessity for a complainant to have seen the penetration for a rape to have been committed (see paras 35, 37 & 39).

(5) The SCJ had considered the correct and relevant factors when passing sentence. Looking at all the circumstances of the case, the court agreed with the sentence of 20 years imprisonment and the seven strokes of the *rotan* which was imposed by the SCJ was right, proper and fitting. The sentence imposed was not manifestly excessive (see para 43).

[Bahasa Malaysia summary

Perayu dituduh dengan kesalahan merogol yang boleh dihukum di bawah s 376(2) Kanun Keseksaan. Secara ringkas, perayu telah melanggar mangsa ('PW1') dan menawarkan diri untuk membawanya ke hospital. Daripada membawa mangsa ke hospital, perayu telah membawa PW1 ke rumahnya di mana dia telah mengikat PW1 dan merogolnya. Dalam mahkamah sesyen perayu telah disabitkan terhadap pertuduhan dan dihukum 20 tahun penjara dan tujuh sebatan rotan. Tidak berpuas hati dengan keputusan hakim

mahkamah sesyen ('HMS'), perayu merayu terhadap sabitan dan hukuman dan menghujahkan bahawa tidak terdapat keterangan yang menunjukkan kecederaan dialami oleh PW1; tiada elemen paksaan digunakan dalam kes ini; tiada keterangan sokongan; SP1 tidak melihat sama ada terdapat penetrasi; tidak terdapat penetrasi; dan HMS gagal untuk mempertimbangkan pengurangan hukuman terhadap perayu.

Diputuskan, menolak rayuan:

(1) Pengadu sememangnya mengalami kecederaan sebelum dan semasa dirogol. Dia mengalami kecederaan apabila perayu melanggarnya dengan kereta perayu. Walaupun kecederaan itu tidak serius jika dibandingkan dengan kecederaan yang didapatinya sewaktu dirogol dan selama perkosaan, mereka didapati akibat daripada kemalangan dan adalah mencukupi untuk melumpuhkannya sementara waktu sehingga tahap perayu mampu untuk mengambil kesempatan daripada keadaannya yang lemah. Dia juga mengalami kecederaan apabila dia dikasari oleh perayu untuk menundukkan tentangannya. Dia mengalami kecederaan di lehernya apabila muka dan lehernya ditekan ke tilam sehingga sukar untuk bernafas (lihat perenggan 16).

(2) Terdapat paksaan yang digunakan ke atas pengadu dalam kes ini. Ini terhasil daripada keterangan pengadu dan disokong oleh keterangan jururawat, Dr Patrick ('PW6') dan Dr Rozita ('PW8') kepada siapa pengadu telah melaporkan perkosaan. Mahkamah tidak dapat bersetuju dengan perayu yang bahawa fakta menunjukkan perayu dan pengadu mengadakan hubungan seksual secara rela. Dilanggar oleh kereta sebelum dibawa ke rumah perayu, dikasari dan diikat sebelum aksi seksual tidak konsisten dengan dan tidak mungkin boleh dilihat sebagai hubungan seksual konsensual (lihat perenggan 24 & 28).

(3) Berdasarkan fakta PW8 hanya menjalankan pemeriksaan ringkas dan luaran terhadap pengadu sebelum merujuknya ke hospital yang mana pemeriksaan penuh dan lengkap dijalankan oleh PW6, tidak terdapat percanggahan antara keterangan kedua-dua doktor perubatan berkenaan pendarahan daripada faraj pengadu. Keterangan mereka semestinya akan berbeza kerana tiada cadangan bahawa Dr Rozita pernah memeriksa faraj pengadu (lihat perenggan 34 & 35).

(4) Keterangan pengadu akan menunjukkan terdapat penetrasi. Walaupun dia tidak melihat zakar perayu sebenarnya memasuki farajnya, dia merasainya dan dia merasai kesakitan itu. Tidak ada sebab untuk tidak mempercayai keterangannya terutama apabila analisis DNA akan menunjukkan terdapat ejakulasi dan oleh itu kesan mani daripada perayu telah didapati pada tuala, baju dalam, tiub seluar dalam, dan juga pakaian dalam. Pengadu telah memberi keterangan terhadap kesakitan yang dirasainya apabila perayu merogolnya dan ini telah disokong oleh

kehadiran kesan darah pada tuala, baju kurung dan tiub seluar dalam. Kehadiran kedua-dua DNA pengadu dan juga perayu pada pita pelekat yang telah digunakan akan menyokong cerita pengadu bahawa dia telah diikat. Ketiadaan profil DNA perayu pada swab tinggi faraj, swab rendah faraj dan rembesan faraj akan menyokong keterangan pengadu bahawa perayu telah mengejakulasi di atas perutnya. Tidak ada keperluan untuk pengadu untuk melihat penetrasi untuk suatu perkosaan dilakukan (lihat perenggan 35, 37 & 39).

(5) HMS telah mempertimbangkan fakta yang betul dan relevan apabila memberikan hukuman. Melihat kepada semua keadaan kes, mahkamah bersetuju dengan hukuman 20 tahun penjara dan tujuh sebatan rotan yang dikenakan oleh HMS adalah betul, wajar dan bersesuaian. Hukuman yang dikenakan tidaklah keterlaluan (lihat perenggan 43).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 288–371.

Legislation referred to

Penal Code s 376(2)(a)

Adenan Ismail (Adenan & Assoc) for the appellant.
Vicknesvaran a/l Purnshatman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Amelia Tee Abdullah J:

[1] The appellant, Che Mohd Sufian @ Che Bastian bin Che Rashid, was charged with an offence of rape punishable under s 376(2)(a) of the Penal Code. On 13 December 2011, at the close of the defence case, the learned *hakim mahkamah sesyen* ('HMS') had convicted the appellant on the charge and had sentenced him to 20 year's imprisonment with effect from the date of sentence and to seven strokes of the *rotan*. The appellant, being dissatisfied, has now filed an appeal against his conviction and sentence.

[2] The charge against the appellant reads as follows:

PERTUDUHAN

Bahawa kamu pada 20.11.2009 di antara jam lebih kurang 7.20 pagi hingga jam lebih kurang 8.30 pagi bertempat di rumah No 17-0-1, Kelumpuk Nuri C, Jalan AU 25/26, Ampang Ulu Kelang dalam daerah Sentul, di dalam negeri Wilayah Persekutuan Kuala Lumpur didapati telah merogol seorang perempuan nama Norlizawati bt Omar, kad pengenalan bernombor 821201-05-5218, umur 26 tahun 11 bulan dan sejurus sebelum melakukan kesalahan itu kamu telah menyebabkan kecederaan kepada seorang perempuan nama Norlizawati bt Omar,

kad pengenalan bernombor 821201-05-5218. Oleh yang demikian kamu telah melakukan kesalahan di bawah seksyen 376(2)(a) Kanun Keseksaan dan boleh dihukum di bawah seksyen 376(2) Kanun Keseksaan.

[3] In his appeal before the High Court, the appellant has raised five broad grounds of appeal, namely:

(a) there is no injury suffered by the victim ie PW 1 — that there is no evidence to say that there was any injury caused to the victim;

(b) there is no element of force used in this case;

(c) there is an absence of corroboration;

(d) SP1 did not see whether there was the penetration; there was an absence of penetration; and

(e) the failure to consider the mitigation of the appellant.

The court will deal with each of these grounds in turn.

WHETHER THE COMPLAINANT HAD SUFFERED INJURY

[4] The first issue raised by the appellant relates to the alleged failure of the prosecution to prove that the complainant was injured. Learned counsel for the appellant has submitted that there was absolutely no evidence adduced to show that the appellant had injured the complainant/victim before having sexual intercourse with her against her will. It was submitted that the evidence of the witnesses would show that there was absolutely no injury caused to the victim and that this was confirmed by PW3, the first nurse who had examined the victim. It was further submitted that the 'keterangan pakar' — referring to PW6 and PW7 — had not stated that there were injuries on the victim. In addition, it was submitted that the investigating officer had also stated that the victim did not suffer any injuries.

[5] On the other hand, the learned deputy public prosecutor has submitted that the victim had indeed suffered injuries when she was hit by the appellant with his car. Although the injuries were not serious, however they had left the complainant in a weak and semi-conscious state after the accident.

[6] On this issue of whether the complainant was injured, the court notes her evidence that after she was hit by the appellant's Wira, she had 'terpelanting dekat longkang — separuh sedar. Badan saya sakit-sakit'. According to her she was hurt at the 'Bahagian badan saya, peha, kaki, tangan — siku kiri'. And the complainant was consistent during cross-examination when she testified that

'saya dilanggar dan arah depan dan terpelanting di tepi dan badan sakit tidak boleh bangun' (p 78 of the appeal records). The court notes the following exchanges recorded in the notes of evidence:

Q:	Tengah jatuh ada letak tangan kemudian jatuh?
A:	Saya tidak tahu, saya sedar saya dilanggar yang saya tahu saya sakit bila dilanggar.
Q:	Bila jatuh langsung tak sedar?
A:	Saya mamai dan sedar dan terkejut.
Q:	Ada berlaku perdarahan?
A:	Ada calar je la.
Q:	Calar dimana?
A:	Lengan sikit sahaja. Tak teruk sangat.

[7] From the above account, the court finds that although the complainant was not seriously injured following the accident, she had nevertheless 'terbang' after being hit by the appellant's car. She had, in her own words 'jatuh terpelanting' and although she had tried, was unable to get up again. She had suffered 'calar' at her 'lengan'. Whether the incident was really an accident or whether it was a deliberate act on the part of the appellant, the complainant had suffered injuries, albeit not serious or life-threatening injuries.

[8] The court further notes the complainant's testimony as to the fact that she was roughed up ('dikasari') by the appellant. The following exchange appears at p 63 of the appeal records:

S:	Lepas itu dia tiarapkan?
J:	Dia kasari saya, dia duduk atas belakang saya, dia ikat tangan saya dengan cellotape, dia pegang tengkok saya. Saya menangis, cuba menjerit, saya cakap 'jangan apa-apakan saya'. Dia cakap jangan bising, dia cakap lagi kasar aku buat kat kau'. Selepas dia ikat saya, dia lentangkan saya dan angkat saya bawa masuk ke dalam biliknya. Tangan saya di ikat ke belakang dengan cellotape.

And at p 73:

Q:	Semasa rogol — apa kecederaan kamu?
J:	Pendarahan di kemaluan, tengkok saya rasa sakit — tidak cedera.
Q:	Kenapa tengkok sakit?
J:	Semasa dia nak ikat saya, dia menekan tengkok saya, muka saya di sembamkan ke tilam, saya sesak nafas. Ada bekas/kesan warna merah di pergelangan tangan — kesan ikatan cellotape.

[9] The court has considered the appellant's submissions that PW3 had confirmed that no injury was caused to the victim and that PW6 and PW7 had not stated that there were injuries on the victim. Is this submission borne out by the evidence adduced in this case?

[10] The court has carefully perused the evidence of 'PW3', Wan Hasrah bt Wan Abdullah. She is the clinic nurse at the *klinik kesihatan* and the complainant was the first patient who had seen her on the morning of 20 November 2009. When the complainant entered *Bilik Rawatan* 3, the complainant had held her hand and said that she had been raped ('Bila dia datang, dia pegang tangan saya, dia kata dia telah dirogol'). According to PW3, she had calmed down the complainant and straightaway called Dr Rozita. She had left the complainant with Dr Rozita whilst she herself had dealt with other patients. There is no indication from her evidence that she had examined the complainant at any point in time.

[11] As such, the court finds that although PW3 had, in response to a question from learned counsel for the appellant, said that the complainant was not injured following the accident, the court is of the considered view that her answer was linked to her earlier evidence that the complainant was able to walk, and also to talk normally. As the court has stated earlier, since there is no suggestion that PW3 had examined the complainant physically at any point in time, the court is unable to find that PW3 is able to testify that the complainant was not injured except maybe to the extent that she could walk and talk.

[12] As regards whether PW6 and PW7 had stated that there were no injuries on the complainant, the court notes that 'PW7' Dr Seah Lay Hong is the chemist who had carried out the DNA analysis on the specimens that were taken from the complainant and the appellant. As such, the court finds that the appellant's submission that PW7 had not stated that there were any injuries on the complainant to be totally misconceived. PW7 had never examined the complainant physically and as such would have been unable to say if there were any injuries on the complainant.

[13] The court believes that in this regard, the appellant was actually referring to PW8 and not to PW7. 'PW8' is Dr Rozita bt Ariffin. She is the doctor who had first seen to the complainant at the *klinik kesihatan*. After she had seen and heard from the complainant about her being knocked down by the appellant's car and then being raped, she had called the Balai Polis Ulu Kelang and reported the matter to Sarjan Nik Hamdan ('PW2'). According to PW8, she had only conducted a 'pemeriksaan luaran sahaja' on the victim and had referred the complainant's case to Hospital Kuala Lumpur. She explained that a 'pemeriksaan luaran' is only a brief examination only to ascertain that the patient was stable by taking her blood pressure. According to PW8, she had

found no serious injuries ('tiada kecederaan serius'). The court is of the considered view that PW8 saying that the complainant 'tiada kecederaan serius' or 'no serious injuries' is a far cry from saying that there were no injuries on the complainant. As such, the court finds that the appellant's submission on this score to be without merit.

[14] As regards Dr Patrick Naveen a/l Sargunan ('PW6') who is the expert O & G doctor in this case, the court finds that his examination of the patient was more towards ascertaining if she had indeed been raped. According to PW6, he had examined the victim from head to toe and 'Tidak ada apa-apa dijumpai kecuali bleeding di faraj itu'. Thus, although PW6 did in fact state that he did not find anything else except the bleeding in the vagina, the court expresses some concern as to whether PW6 had been as concerned over other physical aspects of the complainant which were not associated with the issue of whether she was raped. PW6 had confessed to not having been so thorough in his history taking. He agreed that he had not stated in P23 that the victim was tied and that the reason he did not do so was that 'Maybe I was in a rush at that time'. He was on call on that day and 'would have a patient in the OT room. I have to quickly to do this and also operate on the other case' (p 121).

[15] As regards Insp Jamalizah Jaafar ('PW9'), the investigating officer, the court recalls her evidence as follows:

Q: Siasat atau tidak, kemalangan serius atau tidak? Terhadap pengadu?

A: Saya siasat, tidak serius.

Q: Maknanya tidak ada kecederaan?

A: Tidak ada kecederaan yang serius.

As such, the evidence of the investigating officer is *NOT* that the victim did not suffer any injuries but that she did not suffer any serious injuries.

[16] Thus, based on the findings of the court as stated above, the court is satisfied that on the totality of the evidence adduced, the complainant did indeed suffer injuries both before and during the rape. She suffered injuries when the appellant knocked her down with his car. Although these injuries were not serious as compared to the injuries sustained during the rape and in the course of the rape, however the injuries sustained as a result of the accident were sufficient to temporarily incapacitate her to such extent that the appellant was able to take advantage of her weakened condition. In such circumstances, the court finds that the question of whether the accident was accidental or whether it was a deliberate act of the appellant assumes a somewhat lesser importance. She had also suffered injuries when she was 'dikasari' by the appellant in order to subdue her resistance. She suffered injury to her 'tengkok' when her face and neck were pressed into the mattress such that found

difficulty to breathe. She had complained of pain to Dr Rozita whilst waiting for the police to arrive and the doctor had given her two paracetamol and calmed her down. In any event, the court finds that the appellant's submission on this first issue to be without merit as the complainant had indeed suffered injuries both before and during the rape.

WHETHER THERE WAS FORCE IN THIS CASE

[17] On this issue, the appellant submits that the learned HMS had erred in law and in fact when she found that there was force used against the complainant in this case. The appellant submits that from the complainant's evidence as to how she was brought to the appellant's house before being brought to the hospital, the respondent had failed to prove there was force used in the sexual encounter between the appellant and the complainant. Learned counsel for the appellant has referred the court to p 63 of the appeal records which allegedly shows that there was no evidence that the complainant had objected to or resisted the appellant's invitation to his house. In this regard, the court has examined both p 62 as well as 63 where the complainant had testified that:

(a) '... saya tidak sedar sepenuhnya selepas di langgar. Pening, saya tak mampu melawan';

(b) '... Dia dukung saya, bawa masuk ke ruang tamu dan letak saya di tilam. Saya tanya kenapa tak hantar saya ke hospital. Saya menangis ...';

(c) '... Dia kasari saya. Dia duduk atas belakang saya, dia ikat tangan saya dengan cellotape, dia pegang tengkok saya. Saya menangis, cuba menjerit, saya cakap 'jangan apa-apakan saya'; and

(d) 'Saya cuma melawan, dia ugut saya jangan melawan, jangan menangis, dia akan mengasari saya lagi. Semasa saya di angkat ke dalam bilik, tangan saya di ikat. Saya tak boleh buat apa-apa tangan saya terikat'.

[18] From the above excerpts from the testimony of the complainant, the court is of the considered view that the appellant's contention as to the absence of any evidence of the complainant resisting is totally not borne out by the evidence. The court notes her evidence that after she was hit by the appellant's car, she was 'pening' and was unable to resist. When she was put inside the appellant's car, she had thought that she was being sent to the hospital. Later, she had cried and asked why she was not sent to the hospital. She was 'dikasari' or roughed up by the appellant who had sat on her back and pressed her neck and face to the mattress and tied her hands with cellotape. The complainant had tried to resist ('melawan') but was threatened.

[19] The court has taken note of the learned deputy's submissions on this issue. There is evidence that the complainant had struggled. At p 65 of the appeal records, the court notes the following exchanges:

Q: Apa yang kamu buat?

J: Saya cuba melawan, meronta tapi saya tak mampu — saya tak larat, terkejut, takut.

Q: Macam mana kamu meronta?

J: Kaki saya bergerak-gerak tapi tak dapat — sebab badan dia berat menghempap saya. Saya hanya menangis.

[20] There is ample evidence from the complainant which shows that she was in fear. This is evident not only from her own evidence but also from the evidence of those persons who had come into contact with her soon after her rape. In this context the court notes the complainant's evidence to the effect that:

> Saya takut dia akan bunuh saya lepas itu. Saya tak mampu melawan dalam keadaan itu (page 65),

As such, the complainant had resolved to speak nicely and gently to the appellant to prevent any violence to her person. She had:

> cakap kepada dia dengan baik minta hantar saya ke Hospital. Saya dapati dia baik dengan saya, tidak kasari saya dan dia bawa saya ke Hospital — Klinik Kesihatan, Jalan Jelatik, Datok Keramat.

[21] The court has considered the issue raised by the appellant that the complainant had the opportunity to run away if she really did not want to be with the appellant. The suggestion is that since she did not do so, it would mean that she had agreed to be there and to remain there.

[22] In this context, the court notes the complainant's evidence that when she was first brought to the appellant's quarters, she was still suffering the ill-effects after being knocked down by the appellant's car and was in no fit condition to protest. She was only able to cry. The appellant was violent towards her before the rape when the complainant was subdued and had her hands tied with cellotape. She described this cellotape as 'Cellotape besar, warna hitam, yang digunakan untuk ikat barang'. During the rape, she had closed her eyes and was in fear, afraid that she would be killed after that. The court notes the complainant's evidence as to what she had done in her attempt to preserve her own life:

(a) 'Saya cakap 'sakit sangat'. Saya takut kena bunuh. Saya cakap dengan lembut 'minta tolong hantar ke Hospital sebab saya sakit'. Lepas itu

ikatan tangan saya dibuka. Lepas itu dia suruh saya pakai semula pakaian saya dan saya berlagak baik sebab saya takut kena bunuh'. (p 66); and

(b) when they were at the front of the house, the appellant had asked her to sit and wait whilst he fetched the car. He was gone for about 2–3 minutes. During that time, she had considered whether to run. However, she did not know where she was. As such, she felt that it was better to go to the hospital where she could report the rape to the doctor (p 67).

[23] The court is of the considered view that the complainant's actions in speaking nicely to the appellant, to ask to be taken to the hospital, to allow him to escort and bring her to the hospital, all done in an attempt to avert any violence to her person after the rape, cannot conceivably be viewed as her agreement and consent to sexual relations with the appellant.

[24] The court finds that the complainant's lack of consent is amply borne out by her actions and reaction after the rape when she was with Wan Hasrah bt Wan Abdullah (PW3), the nurse at the Klinik Kesihatan Datuk Keramat Dalam. The court finds the evidence of PW3 to be extremely relevant as she was the first person to see the complainant alone after the rape. The court notes her evidence as regards her encounter with the complainant:

> Bila dia datang, dia pegang tangan saya, dia kata dia telah dirogol. Selain itu, dia tiada beritahu apa-apa lagi. Saya tenangkan dia. Terus panggil doktor. Saya tenangkan dia kata duduk sebentar, kejap lagi saya bantu awak. … Keadaan pesakit ketika itu, sedikit ketakutan. Reaksi ketika beritahu dia dirogol, dia pegang tangan saya, goncang tangan saya. Kemudian saya tenangkan dia. (p 98).

[25] From PW3's account, it can be seen that at the earliest opportunity that the complainant had away from the appellant, she had informed the clinic nurse that she had been raped. The court views the complainant's action as the actions of a person who has just been raped and not the reactions of one who had just had consensual sex with the appellant.

[26] And Dr Rozita bt Arifin (PW8), the doctor who was called by PW3 to attend to the complainant had confirmed that the complainant was crying and in fear when she had described how she was hit by a car and then raped by the driver. Whilst waiting for the police to arrive, she had also complained of being in pain, and PW8 had given her two paracetamol to alleviate the pain.

[27] Dr Patrick Naveen a/l Sargunam (PW6), the doctor who had examined the complainant had testified that the first time he had seen the complainant, he had found 'mangsa keadaan luarannya nampak pucat dan juga ketakutan

pada masa itu. Bila saya tanya pesakit, pesakit kata dia kena rogol' (p 115). He had conducted an examination of the complainant and had found 'di faraj mangsa ia berdarah di bahagian luar faraj dan dalam faraj. Luar ada abrasion lebih kurang 0.5 cm.' (p 116). He went on to describe how the injuries that he saw could have been caused:

> Berdasarkan pengalaman, faraj mangsa berdarah mungkin sebab ada luka di faraj. Darah itu datang dari luar dan dalam faraj. Luka mungkin berlaku sebab bersama iaitu zakar lelaki dimasukkan ke dalam faraj perempuan.
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> Abrasion adalah luka dimana kulit dekat luar itu macam digesel keluar. Abrasion biasanya disebabkan oleh hubungan seks secara kasar atau dipaksa. Kesan abrasion itu macam baru berlaku dalam 24 jam. (page 116).
>
> Dari mangsa, darah yang keluar adalah dan pangkal rahim dan luar. Yang luar adalah dari vulva. Pangkal rahim biasanya berdarah bila pesakit haid. Untuk pesakit ini, ia berdarah mungkin sebab luka di dalam, yang mungkin disebabkan oleh kekerasan ketika bersama iaitu melakukan hubungan seks. Bahagian pesakit berdarah sebab secara paksa, kekerasan, mungkin mangsa ada resist attack. (p 120).

[28] Looking at the totality of all the evidence adduced in this case, the court is satisfied that the learned HMS was not in error when she found that force was used on the complainant in this case. This is amply borne out by the evidence of the complainant and corroborated by the evidence of PW3, PW6 and PW8 to whom the complainant had reported the rape. The court is unable to agree with the appellant that that the facts show that the appellant and the complainant had a consensual sexual encounter. The court is of the considered view that being hit by a car before being taken to the appellant's house, being roughed up and tied up before the sexual act is not consistent with and could not conceivably be viewed as consensual sex. As such, the court finds that the appellant's appeal on this ground to be without merit.

ABSENCE OF CORROBORATION

[29] The court notes that in his written submissions, the appellant has submitted that the learned HMS had erred in law and in fact when she failed to consider that the evidence of the medical expert showed that 'tidak ada kesalahan dilakukan'. However, grounds 3.10, 3.11, 3.12 and 3.13 refers to quite something else, namely the absence of fresh tears to the complainant's 'kemaluan' despite the fact that the medical examination was carried out only three hours after the alleged rape; that there were no injuries to the vaginal wall; and the alleged contradictions between the two medical officers pertaining to the bleeding in the complainant's vagina.

[30] On the question of fresh tears to the 'kemaluan', the court is of the considered view that care must be taken to distinguish between tears to the hymen and abrasions to the vagina. Whilst ground 3.12 of the petition of

appeal complains about the absence of 'kesan koyakan baru pada kemaluan mangsa', however the court notes that when PW6 was talking about 'tears', 'old tears' and 'fresh tears', he was in fact talking about tears to the hymen and not about tears to the 'kemaluan'. As PW6 said at p 123 of the appeal records, the hymen is supposed to be intact when a person is a virgin and has not had sexual intercourse. Tears to the hymen can be due to sexual intercourse, child birth or any other trauma. Once the hymen is torn from whatever cause, there is no longer an issue of any more 'fresh tears' to that hymen. As such, if the appellant was referring to the hymen in ground 3.12, then the court finds that that ground to be sadly misconceived.

[31] The court notes that PW6 had also talked about 'abrasions'. He described an abrasion as 'when the outer skin layer has been forcibly removed or due to trauma' (p 23). According to him, abrasion can come with bleeding. An abrasion is a wound or 'luka' and can cause bleeding. Usually, normal intercourse would not cause abrasions. However, where intercourse is done forcibly, it can cause abrasions.

[32] The court has carefully perused the evidence of PW6 in relation to his examination of the complainant. His findings have been described earlier in para 29 above. There was bleeding both from inside and outside the vagina. The bleeding from outside the vagina came from the abrasions on the exterior ie the vulva. There was no tear to the vaginal wall. The internal bleeding came from the cervix or 'pangkal rahim'.

[33] The court has also examined the evidence of the other medical officer, namely Dr Rozita bt Arifin (PW8) to see if her evidence in court had contradicted that of Dr Patrick Naveen (PW6). The court notes that during cross-examination, PW8 had agreed that there was no bleeding, based on what was informed by the complainant (p 141). However, it must be borne in mind that PW6 had repeatedly during her evidence in court stressed that she had only carried out an external examination of the complainant. This is evident from her evidence where she has testified:

(a) 'Saya juga melakukan pemeriksaan luaran sahaja, saya dapati tiada kecederaan serius. Pemeriksaan luaran adalah pemeriksaan secara ringkas sahaja. Tidak menyentuh dalaman. Memastikan pesakit dalam keadaan segar dan stabil dengan mengambil tekanan darah.' (p 137); and

(b) 'saya tidak periksa kemaluan pesakit sebab ia di luar bidang tugas saya. Sebab itu saya rujukkan pada hospital' (p 138).

[34] In light of the fact that Dr Rozita (PW8) had only carried out a brief and external examination of the complainant before referring her to the hospital

where a full and complete examination was carried out by Dr Patrick Naveen (PW6), the court is of the considered view that there are no contradictions between evidence of the two medical doctors pertaining to the bleeding from the complainant's 'kemaluan'. Their evidence would necessarily be different because there is no suggestion that Dr Rozita had ever examined the complainant's 'kemaluan'. As such, the court find no merit in this ground of appeal.

THE COMPLAINANT DID NOT SEE THE PENETRATION/THERE WAS NO PENETRATION

[35] Learned counsel for the appellant has submitted that there was absolutely no evidence ('tidak ada langsung keterangan') of penetration in this case. Further, it was contended that there was no supporting evidence to suggest that there was penetration. It was pointed out that the complainant had only said that the appellant's penis had entered her vagina. She did not see the penetration but was sure that there was penetration because she had felt the pain.

[36] What is the complainant's evidence re the penetration? The court notes the following evidence:

(i) Lepas dia buka girdle saya — tangan dia meraba-raba payu dara saya, dia masukkan kemaluan dia dan merogol saya. (page 64);

(ii) S: Nampak kemaluan masuk?

J: Tak nampak. Saya pejam mata dan takut. (page 65);

(iii) S: Pasti yang masuk itu kemaluan?

J: Ya, saya rasa, kemaluan itu masuk, saya rasa sakit.

S: Berapa lama kemaluan itu masuk?

J: Saya tak tahu, tak pasti, tapi lebih kurang 5 minit. Selepas 5 minit, dia buang air maninya di perut saya.

S: Nampak air mani di perut kamu?

J: Saya dapat rasa melekit-lekit di perut. Kemudian, dia ambil towel dan lap air mani di perut saya. (page 66)

[37] The court finds that the evidence of the complainant would show that there *was* penetration. Even though she did not see the appellant's penis actually entering her vagina, she felt it and she felt the pain. The court sees no reason to disbelieve her evidence especially when the DNA evidence shows:

(a) that the bloodstains found on the towel recovered from the premises contained the complainant's DNA;

(b) the seminal stains on the towel recovered from the premises contained both the appellant's as well as the complainant's DNA;

(c) the used adhesive tape recovered from the premises contained the DNA of both the appellant and the complainant;

(d) the swab taken of the complainant's nail clippings were found to contain not only her DNA but also the appellant's DNA;

(e) bloodstains matching the complainant's DNA profile was found on the complainant's *baju kurung*;

(f) seminal stains as well as bloodstains found on the complainant's brassiere were found to match the appellant's DNA profile;

(g) seminal stains and bloodstains on the tube underwear and girdle of the complainant were found to match the DNA profiles of the appellant and the complainant; and

(h) seminal stains found on the complainant's underwear were found to contain both the appellant's and the complainant's DNA.

[38] The court is of the considered view that the above recounting of the results of the DNA analysis would show that there was ejaculation and hence seminal stains from the appellant were found on the towel, brassiere, tube underwear, as well as underwear. The complainant had testified as to the pain that she felt when the appellant had raped her and this is corroborated by the presence of her blood stains on the towel, *baju kurung* and tube underwear. The presence of both the complainant's as well as the appellant's DNA on the used adhesive tape would corroborate the complainant's story that she was tied up. The absence of the appellant's DNA profile from the high vaginal swab, low vaginal swab, and vaginal pool would corroborate the complainant's evidence that the appellant had ejaculated on her stomach ('perut').

[39] After carefully considering all the evidence adduced on this issue, the court is satisfied that the learned HMS was not in error when she found that penetration had been proved in this case. There is no necessity for a complainant to have seen the penetration for a rape to have been committed. As such, the court is satisfied that in this case there was proof of penetration by the appellant, although he had ejaculated outside the vagina.

WHETHER THERE WAS A FAILURE TO CONSIDER THE MITIGATION

[40] The appellant submits that the learned HMS had erred in law and in fact when she failed to consider the appellant's plea in mitigation. The court finds nothing in the notes of evidence or the grounds of decision to support this

contention. In her grounds, the learned HMS had duly considered the plea of the appellant that he is a first offender. He was a former member of the armed forces and had worked with the ATM for 15 years. As a result of this case, he had been sacked from the ATM and had now lost everything. He is now unemployed and with no source of livelihood. He is divorced with two young children who are under the care of his former wife. All these factors appear in the grounds of decision and were duly considered by the learned HMS.

[41] On the other hand, it can be seen that the learned deputy public prosecutor had prayed for a deterrent sentence, urging the HMS to consider the public interest, the trauma that had been caused to the complainant and the manner in which the rape had been committed where the complainant had been knocked down, put in fear, tied up and raped.

[42] In passing sentence, the learned HMS had considered the rampancy of offences of rape, the manner in which the rape had been committed in this case, the psychological ill effects on the victim and most importantly, the public interest.

[43] The court is of the considered view that the learned HMS had considered the correct and relevant factors when passing sentence. Looking at all the circumstances of the case, the court is in agreement with the sentence of 20 years imprisonment and seven strokes of the *rotan* which was imposed by the learned HMS was right, proper and fitting. The sentence imposed was not manifestly excessive. As such, the court had dismissed the appellant's appeal and confirmed the conviction and sentence of the sessions court.

Appeal dismissed.

Reported by Afiq Mohamad Noor